

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

**UNITED STATES OF AMERICA,**

**v.**

**ALVARO OCHOA-MOLINA,**

**Defendant.**

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**CIVIL ACTION NO.  
1:14-CR-177-SCJ-RGV**

**ORDER**

This matter appears before the Court for consideration of the Final Report and Recommendation ("R&R") of Magistrate Judge Russell G. Vinyard (Doc. No. [40]), to which no objections have been filed, and on Defendant's Motion for Leave to Appeal in Forma Pauperis (Doc. No. [43]).<sup>1</sup> As an initial matter, after reviewing the R&R, it is received with approval and ADOPTED as the opinion

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<sup>1</sup> Rather than file objections to the R&R, Defendant filed a notice of appeal to the United States Court of Appeals for the Eleventh Circuit (Doc. No. [42]). The filing of a notice of appeal generally divests the district court of jurisdiction or control over a case. United States v. Roemmele, 506 F. App'x 891, 892 (11th Cir. 2013); United States v. Tovar-Rico, 61 F.3d 1529, 1532 (11th Cir. 1995). However, the United States Court of Appeals for the Eleventh Circuit has recognized exceptions to the general rule. See United States v. Vicaria, 963 F.2d 1412, 1415 n.2 (11th Cir. 1992) (noting that district courts retain jurisdiction to rule on any order when the pending appeal involves a nonappealable order). In this case, Defendant filed a notice of appeal prior to the Court ruling on the R&R and thereby issuing a final order with respect to Defendant's Motion to Vacate, Set Aside, or Correct Sentence (Doc. No. [26]). The Court retains jurisdiction to rule on the R&R.

and order of this Court. Because the Court's adoption of the R&R results in a final, appealable order, as noted by the Magistrate Judge in the R&R, Defendant is advised that (a) he has the right to an appeal, and (b) with few exceptions, any notice of appeal must be filed within fourteen days, pursuant to Federal Rule of Appellate Procedure 4(b)(1)(A).<sup>2</sup> Having adopted the R&R, the Court next addresses Defendant's request for leave to appeal *in forma pauperis*.

Defendant, Alvaro Ochoa-Molina, has filed a notice of appeal (Doc. No. [42]) and has applied for leave to appeal this case *in forma pauperis* (Doc. No. [43]). 28 U.S.C. § 1915 and Federal Rule of Appellate Procedure 24 govern the determination of applications to proceed *in forma pauperis*. Federal Rule of Appellate Procedure 24 provides:

A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless:

(A) the district court—before or after the notice of appeal is filed—certifies that the appeal is not taken in good faith or finds

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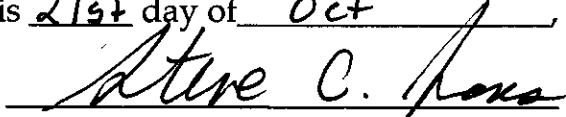
<sup>2</sup> While Defendant filed a notice of appeal (Doc. No. [42]) on August 21, 2015, the Court has concerns regarding the timeliness and validity of the appeal since it was filed prior to the Court's adoption of the R&R.

that the party is not otherwise entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding; or

(B) a statute provides otherwise.

Fed. R. App. P. 24(a)(3). The Magistrate Judge appointed counsel for Defendant in the district-court action on June 17, 2015, under the Criminal Justice Act. Doc. No. [34]. Defendant was permitted to proceed *in forma pauperis* for the criminal proceedings and the evidentiary hearing on Defendant's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. The first requirement to proceed on appeal *in forma pauperis* is met. In addition, neither of the exceptions set forth in Federal Rule of Appellate Procedure 24(a)(3)(A) and (B) are met in this case. The Court finds that Defendant may proceed on appeal *in forma pauperis* based on Federal Rule of Appellate Procedure 24(a)(3). Accordingly, to the extent Defendant is required to file a motion for leave to proceed on appeal *in forma pauperis*, Defendant's application for leave to appeal *in forma pauperis* (Doc. No. [43]) is **GRANTED**.

IT IS SO ORDERED, this 21st day of Oct, 2015.

  
HONORABLE STEVE C. JONES  
UNITED STATES DISTRICT JUDGE